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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1937

No. 362

THE CENTURY INDEMNITY COMPANY
(a corporation),
*Petitioner,*

vs.

G. NELSON,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

## I.

### CONCERNING PROCEEDINGS TO DATE.

Petitioner's "Summary Statement of Proceedings Below" (Pet. page 2) fails to inform the court that after the decision of the Circuit Court of Appeals on the first appeal (65 Fed. (2d) 765) wherein judgment for petitioner on the first trial was reversed

the petitioner, as losing respondent on that appeal, applied to this court for a writ of certiorari and its petition was denied. (*Century Indemnity Co. v. Nelson,* Oct. Term 1933, No. 456, November 6, 1933, 290 U. S. 683, 78 L. Ed. 588.) This bears materially on petitioner's claim here of "plain error", as will later appear.

*Both* opinions of the Circuit ~~Court~~ of Appeal on the present appeal are now reported in 90 Fed. (2d) 644 where the opinion on rehearing is treated as an amendment of the original opinion, just as it is on the record here.

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## II.

### CONCERNING STATEMENT OF THE CASE.

Some additions should be made to petitioner's "Summary Statement of the Case". We will make these additions in connection with the points to which they specifically apply.

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## III.

### FIRST REASON ASSIGNED BY PETITIONER.

It is (Pet. page 12) that the Circuit Court of Appeals erred in refusing to review the action of the trial judge in adopting the findings proposed by respondent and in rejecting the findings proposed by petitioner on the ground that such proceedings did not occur "during the progress of the trial". (28 U. S. C. A. Sec. 875.) Thereby the Appellate Court refused to

pass on the question whether or not the findings have support in the evidence and on other questions that appellant sought to raise on the basis of these same actions of the trial court.

The bill of exceptions in the record reads (pages 130-131):

"Mr. Wisecarver (Atty. for Petitioner). I wish also at this time to make a motion for judgment *and findings.*

Mr. Hadsell (Atty. for Respondent). We do the same on behalf of the plaintiff, for the full amount, and request findings.

Thereafter, the case was orally argued before the court and *was submitted* upon written briefs. *Thereafter* and on June 1, 1934, and outside the presence of the parties, the Court made and entered its order *granting judgment to the plaintiff with findings to be submitted.* Thereafter proposed findings of fact and conclusions of law were served and lodged with the Court by plaintiff, and within the time allowed by law the defendant served and lodged its proposed special findings of fact and conclusions of law in lieu of those proposed by the plaintiff.

Thereafter and on June 16, 1934 the Court, without the presence of the parties, signed the proposed special findings of fact and conclusions of law of the plaintiff and filed same on said date as the findings and conclusions of the Court, and judgment was entered on said June 16, 1934."

The order of the trial court for judgment is at page 21 of the record and reads:

> "This case having been heretofore heard and submitted and due consideration having been had, *it is ordered that judgment be entered for plaintiff*, with interest and costs, upon findings of facts and conclusions of law to be presented."

So, plainly the trial had been concluded with the submission for decision.

The court will note:

1. That petitioner's motion for findings did not specify any finding whatever that petitioner desired the trial court to make and that petitioner with its motion did not offer any findings;

2. That petitioner's motion as made was for "findings" *generally* and not for any "*special* findings" then and there offered;

3. That petitioner's motion did not specify, even generally, what petitioner thought or desired the purport of the findings should be and that the petitioner did not state any grounds for the motion.

The court further will observe that petitioner's challenge to the findings actually made comes by a single assignment of error filed after judgment (Record page 138, Assignment No. 21) and directed only to one finding, and that petitioner's challenge to failures to find come by other assignments numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20 and 24.

The court will also note from Rule 42 of the District Court (quoted in full at page 5 of the Petition) that in this action the making of special findings of

fact is "in the discretion of the court" and that the rule provides the procedure by which the trial court will exercise such discretion.

So it is important that there shall not be confused into one thing two very separate things, namely:

(a) a request for particular findings to a particular effect and in particular words—that is, a request that the court adopt findings that the party has formulated and submits to the court with the request; and,

(b) a request that when the trial court shall decide a case on the law side it shall exercise its discretion to make findings by directing that findings shall be made to conform to the court's decision.

To ask for a particular finding to a particular effect is one thing; to ask generally that the court make findings is quite another thing.

To ask the court to make a particular finding to a particular effect is like asking the court to give some specific instruction to a jury. When the request for the instruction is made the instruction must be submitted with the request. Otherwise the trial court does not err in failing or refusing to give the instruction.

So here. If, when petitioner asked the trial court to make findings, the petitioner wanted findings in particular words or to a particular effect, petitioner then and there should have presented the formulated findings that petitioner wanted the trial court to make. But petitioner did not do so. The trial then closed

and the cause was submitted for decision as the record clearly states. There was no reservation made by either party of any right to offer or file proposed special findings in support of such party's motion for findings. The submission for decision was complete. The "progress of the trial" was done.

When the trial court, then, was considering the case after the parties' submission of the case for decision, *the court did not have before it for consideration any "special findings" whatever as requested by either party.* It was under these circumstances that subsequently, as the bill of exceptions states, "the court made and entered its order granting judgment to the plaintiff with findings to be prepared".

Very apposite to our case are the words of this same Circuit Court of Appeals in a case decided some weeks later than the first decision on the present appeal—*Lando v. Equitable Life Assur. Soc.,* 84 Fed. (2d) 640. Justice Denman, who dissents here on one phase of our case, there said for the court:

> "A jury was properly waived, and prior to the submission of the case the insured appellant moved for judgment in his favor and also moved for special findings. *Appellant did not specify the ultimate facts desired to be found. His mere motion that the court make findings one way or another as to the ultimate facts is not a request for findings of specific facts sufficient in itself to warrant a review of the evidence.* Seaboard Surety Co. v. U. S., 84 F. (2d) 348, decided by this court on June 8, 1936. So far as advising the lower court of the claim that the evidence required a judgment in his favor, the situation is

the same as if the appellant had made no more than a motion for such a judgment."

See reference to this case in note to the court's second opinion here. (Record page 170.)

Mr. Paul P. O'Brien, Clerk for the Circuit Court of Appeals for the Ninth Circuit, published in 1929, for the help of attorneys conducting appeals, a book entitled "Manual of Federal Appellate Procedure" (Second Edition) to which he also publishes cumulative supplements. In the "1937—Cumulative Supplement", dated September 1, 1937, he states at pages 9-10:

> "A request for judgment, or for a declaration of law, or for special findings of fact and conclusions of law, made after the case has been submitted, and the trial judge has announced his decision, but before formal judgment has been entered, comes too late and is not made 'during the progress of the trial' as required by Par. 700 R. S. (28 USCA Sec. 875). It is essential that such motions be made at or before the submission of the cause for decision, both in a case submitted upon an agreed statement of all the ultimate facts, as well as in cases tried by the court without a jury."

His citations are:

*Continental Bank v. National City Bank, etc.* (CCA 9), 69 F. (2d) 312;

*Babbitt Bros. Trading Co. v. New Home Sewing Machine Co.* (CCA 9), 62 F. (2d) 530, 536, concurring opinion of Wilbur, C. J.;

*Columbia Nat. Life Ins. Co. v. Griffith* (CCA 8) 73 F. (2d) 244, 248;

*Sanfeliz v. Bank of Nova Scotia* (CCA 1), 74 F. (2d) 338;

*Huron College v. Union County Trust Co.* (CCA 8), 77 F. (2d) 609;

*Inland Irving Nat. Bank of Chicago v. American Flange and Mfg. Co.* (CCA 7), 75 F. (2d) 553;

*First Nat. Bank of San Rafael v. Philippine Corp.* (CCA 9), 51 F. (2d) 218;

*Lando v. Equitable Life Ass. Society of U. S.* (CCA 9), 84 F. (2d) 640;

*Armstrong v. Metropolitan Life Ins. Co.* (CCA 8), 85 F. (2d) 185, and the present case of

*Century Indemnity Co. v. Nelson* (CCA 9).

Of these cases *Continental Bank v. National City Bank, etc.* (CCA 9), 69 Fed. (2d) 312, is an important case. Judge Mack of New York, sitting here, wrote the opinion for the court, saying:

> "Nevertheless, *the question remains whether or not rulings made and exceptions thereto taken, not merely after submission of the case, but even after the announcement by the court of its opinion and intended judgment, but before rendition of the final judgment, are made and taken 'in the progress of the trial.'* In the opinion in Edwards v. Robinson, supra (8 Fed. (2d) 726, 727—CCA 9), an examination of the record discloses what is not entirely clear from the opinion, that there, as here, the declarations of law were requested some

time *after* the judge had filed his opinion which concluded with the words 'the complaint will be dismissed'—but also some time *before* the trial judge signed and filed the actual judgment of dismissal and his own findings. This court there said that no motion or request for a finding in favor of plaintiff was made 'until long after the close of the trial, and not until 10 days after a decision in favor of the defendants had been announced by the court. Under such circumstances, we are without jurisdiction to consider the sufficiency of the testimony to support the findings.' There are also expressions of opinion in other cases that, for these purposes, *the progress of the trial is concluded when the cause is submitted to the judge, or at least when he announces his decision.* See Babbitt Bros. Trading Co. v. New Home Sewing Machine Co., 62 F. (2d) 530, 535, 536 (CCA 9th, 1932) (Judge Wilbur's concurring opinion); Merriam v. Huselton, 45 F. (2d) 983 C. C. A. 8th, 1930); United States v. Smith, 39 F. (2d) 851, 854 (C. C. A. 1st, 1930); Southern Surety Co. of Des Moines v. United States, 23 F. (2d) 55, 58 (C. C. A. 8th, 1927); Ewert v. Thompson, 281 F. 449, 450 (C. C. A. 8th, 1922). This interpretation accords with the function of the request for ruling and exception to the denial thereof; *it is to direct the judge's attention to the specific proposition of law relied upon, so that prior to the announcement of his conclusions he may have the opportunity to consider it.* True it is that after entry, and until the end of the term during which the judgment has been entered, it may be set aside and a new trial granted or if tried without jury, a contrary judgment entered,

> That, however, is a matter entirely within the court's discretion, and offers no guide to the scope of the general rule. We conclude that there were no rulings 'in the progress of the trial', properly before us for review, other than that on the evidence hereinabove considered."

This decision was made for the Ninth Circuit long before the second trial of our case and was therefore available as a guide to petitioner on such trial.

Thereupon the Continental National Bank petitioned this court for a writ of certiorari in a cause entitled *Continental National Bank v. National City Bank of New York,* and numbered 34 in October Term 1933. The petition was denied. (293 U.S. 557, 79 L. Ed. 659.) One of the reasons urged for the petition was that the decision of the Circuit Court of Appeals on the question in procedure, as above quoted, "is untenable and in conflict with the decision of another Circuit Court of Appeals on the same matter and in conflict with the weight of authority." (See Pet. page 11.) Said petitioner:

> "This case having been tried before a judge, without a jury, on a stipulation of facts spread at large upon the record and having special findings of fact and conclusions of law signed incorporating such stipulation of facts, the Circuit Court of Appeals erroneously refused to review the facts to ascertain if the same supported the judgment, because of an alleged failure to request a declaration of law *prior to the minute order for judgment.*"

Citing cases.

Also (page 12):

> "If such request for a declaration of law were necessary, then timely application therefor was made by petitioners as such application was made before final judgment and in the same term of court." (Citing cases.)

This reason for the petition was stated also in the specifications of errors (Pet. page 21) and at pages 33-36 of the petition authorities and argument are presented for the contention. The respondent filed a brief in opposition to the petition wherein at pages 19-23 respondent distinguished or discounted petitioner's authorities and cited many authorities against petitioner's contention. Therefore we would urge upon the court that its denial of the petition was in effect an affirmance of Judge Mack's opinion and is decisive against the petitioner in the present proceeding.

We fortify this conclusion with what this court itself, in *Arthur C. Harvey Co. v. Malley,* 288 U. S. 415, 418, 77 L. Ed. 886, 867, approved as rightly said in that case by the Circuit Court of Appeals for the First Circuit:

> "Exceptions, *following an order of judgment,* to alleged rulings in a written opinion of the judge assigning reasons for ordering a judgment for either party, *are not rulings in the course of the trial.*"

So here—exceptions to findings proposed by respondent and adopted by the court *after* the order for judgment for respondent was made "are not rulings

in the course of the trial"; and the same is true of exceptions to the trial court's rejection of findings proposed by petitioner (appellant) *subsequent* to the order for judgment.

The specific order of the court in our case was that "judgment be entered for plaintiff * * * upon findings of fact * * * to be presented." Thereby the court had determined what the findings should do; namely, that the findings should find the facts as respondent contended them to be and as entitled plaintiff to judgment. In effect the trial court had then ruled on the facts and the law and the trial had then ended in any event—even if the trial had not ended previously when the parties had unreservedly submitted the cause for decision. All that remained to be done was to formulate findings that should comply with the trial court's order for judgment. There was to be no further "trial".

Rule 42 of the District Court does not help petitioner. The purpose of that rule was not to extend the trial but simply to provide a means whereby the trial court would secure aid in formulating findings expressive of a decision already rendered. The Circuit Court of Appeals very properly so held in its last opinion for the reasons there stated. (Record page 170, Note 1.)

This view of the rule is embodied, in effect, in O'Brien's 1937 Supplement where he states at page 9:

> "The making of special findings of fact in an action at law, tried by the court, on the waiver of a jury, is discretionary with the trial court, and

its action in making such findings, in refusing to make requested findings, or in refusing to amend findings made, is not subject to exception, or to a subsequent review in a federal appellate court",

and cites:

*Denver Live Stock Com. Co. v. Lee* (CCA 8), 18 F. (2d) 11, 16;

*Modoc County Bank v. Ringling* (CCA 9), 7 F. (2d) 535, 536;

*Kansas Society Life Ins. Co. v. Shirk et al.* (CCA 10), 50 F. (2d) 1046.

Later, at page 11, O'Brien states:

"If a party seeks to have reviewed the question whether the record contains any substantial evidence to support the findings and judgment against him, it is incumbent upon him to make a motion for judgment in his favor on that ground, or to request a declaration of law to that effect, or to take some other equivalent step, and secure a ruling by the trial court, and to take exception to such ruling (and include the same in bill of exceptions)",

and cites to his statement:

*Federal Intermediate Credit Bank of Omaha v. L'Herisson* (CCA 8), 33 F. (2d) 841, 843;

*Lyle v. Phillips Petroleum Co.* (CCA 8), 72 F. (2d) 347;

*Fidelity & Deposit Co. of Maryland v. U. S. ex rel. Woods* (CCA 9), 72 F. (2d) 828;

*Mittry Bros. Const. Co. et al. v. U. S. etc.* (CCA 9), 75 F. (2d) 79.

See, also,

*Huron College v. Union County Trust Co.* (CCA 8), 77 F. (2d) 609;

*McLaughlin v. Pac. Lumber Co.*, 293 U. S. 351, 55 S. Ct. 219, 79 L. Ed. 423;

*U. S. v. Martin, etc.* (CCA 10), 80 F. (2d) 460;

*Century Furniture Co. v. Bernhard's, Inc.* (CCA 9), 82 F. (2d) 706;

*Lando v. Equitable Life Ass. Society of U. S.* (CCA 9), 84 F. (2d) 640.

Plainly petitioner had not complied with any of these requirements.

The cases cited by petitioner are not against us.

In *Alexander v. Machan*, 147 U. S. 72, there were sixteen exceptions to findings and thirty-five exceptions to refusals to find; and the statement of this court, as quoted from that case by petitioner, is qualified by the clause "and an exception be taken". But the court's opinion does not say what the procedure should be and the report does not disclose what the actual procedure was. So the opinion is of no help here.

The case of *Mercantile Trust Co. v. Wood*, 60 Fed. 346, is in our favor because it says, as quoted by petitioner:

> "The finding of the court, whether general or special, performs the office of a verdict of a jury. When it is made and filed the trial is ended. *Exceptions to the finding* or to statements of legal conclusions contained in it, or in an opinion in which it is contained, or in an opinion filed with

> it, *avail nothing*. They are as futile as exceptions to the verdict of a jury."

So exceptions to the findings in our case "avail nothing".

Neither does *U. S. F. & G. Co. v. Board of Commissioners,* 145 Fed. 144, aid petitioner. The same judge wrote the opinion there as wrote the opinion in *Mercantile Trust Co. v. Wood, supra,* and cited the earlier case, with others, as deciding

> "The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered."

But, for the reason that the trial is ended when the findings are filed, there cannot be any exception to the findings as the exception does not occur "during the progress of the trial". Nor, after findings filed, can there be any exceptions to any failures to make findings; for the trial is ended and such exceptions come too late.

Petitioner's fourth case, *Thompson-Starrett Co. v. La Belle Iron Works,* 17 Fed. (2d) 536, is also favorable to us rather than to petitioner. The quoted language:

> "It seems to us a needless and idle form to require the party aggrieved to request a ruling that putative future findings, *or special findings already made,* are without any evidence, and we regard an exception *taken on that ground before final action of the court* an exception to rulings made 'in the progress of the trial' "

only means that it is sufficient, where special findings have already been made, to except, *before final action of the court,* on the ground that such findings are without evidence. But when findings have been filed final action has been taken and an exception comes too late —the very thing that has happened in our case.

The correct procedure was forcibly stated by this court in *Fleischmann C. Co. v. U. S.,* 270 U. S. 349, 70 L. Ed. 624, in these words:

> "To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. Norris v. Jackson, supra, 129 (9 L. ed. 609); Martinton v. Fairbanks, 112 U. S. 673, 28 L. ed. 863, 5 Sup. Ct. Rep. 321. That is, as was said in Humphreys v. Third Nat. Bank, 21 C. C. A. 538, 43 U. S. App. 698, 75 Fed. 855, 'he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. *In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits'.*"

Petitioner failed completely to follow these requirements.

## IV.

### SECOND REASON ASSIGNED BY PETITIONER.

The claim is that, despite insufficiency of assignments and specifications of error, there is such "plain error" in the record that the Circuit Court of Appeals, in its *second* opinion on this appeal, should have passed on the merits and should have reversed the judgment.

(a)

Petitioner admits (Pet. pages 6-7) that the Circuit Court of Appeals, in its *first* opinion on this present appeal, decided the merits of the case against petitioner. Petitioner states:

> "Notwithstanding a technical outlook on the procedural aspect of the case the Circuit Court of Appeals commented on the merits of the appeal and concluded that the judgment possessed evidentiary support (R. 163); that the judgment was supported by the findings of fact (R. 162); that the judgment was not contrary to the law of the case (R. 162); and that there was no error in the rulings on evidence (R. 162). It saw no occasion to notice plain error (R. 164)."

If, then, the Circuit Court of Appeals had, in its *second* opinion, gone again into the merits there is no reason to believe that the result would have been any different.

Why the Circuit Court of Appeals refused, in its *second* opinion, to go into the merits is clear enough. For at the end of its *first* opinion, after passing on the merits, it said (Record, page 164):

> "There is, therefore, no reason for relaxing our rule with reference to the specifications of error and there is no basis for relaxing the rule with reference to assignments of error as should be done only in case of a plain error unassigned (rule 11) *and so clearly prejudicial as to result in injustice.* In re Morgan (C.C.A. 6), 26 F. (2d) 183; Mutual Life Ins. Co. v. Parkinson, C.C.A. 6), 72 F. (2d) 759."

That is, in the court's view, any refusal of the court to recognize unassigned (or insufficiently assigned) plain error on this appeal would not be "so clearly prejudicial as to result in injustice". When, therefore, the court in its *second* opinion concluded (as it had already concluded in its first opinion) that the errors on which petitioner really relied were not assigned or were not sufficiently assigned it had no reason to go further to examine the merits under any claim of "plain error unassigned". When the two opinions are taken together they must be deemed to hold that on this appeal the court would not overlook failures in assignments and specifications and go into the merits of the case on the basis of unassigned plain error—all for the reason that refusal to do so was not "so clearly prejudicial as to result in injustice".

(b)

Unassigned plain error will only be noticed where refusal to do so will be "so clearly prejudicial as to result in injustice".

The question then is:

*Would that be the case here?*

In its first opinion the Circuit Court of Appeals unanimously answered "no". After rehearing it maintained its stand by majority vote.

Even the dissenting opinion on the second decision on this appeal does not say that the merits of the case should be otherwise decided than on the first decision on this appeal. Mr. Justice Denman simply contends that the decision on the rehearing should be on the merits and not on technical procedure. For in his view there were sufficient assignments to justify that course.

To understand the problem we must go back to the first appeal.

On the first trial the judgment roll in *Berges v. Abraham* was admitted into evidence. (Record, page 45; No. 456 in this court for October term 1933.) In its opinion on the first appeal (65 Fed. (2d) 765) the Circuit Court of Appeals said (page 768):

> "According to the findings of fact in the Superior Court action the corporation, San Francisco Iron & Metal Company, which is alleged to be one of the copartners, together with L. Silberman, H. Silberman, and N. Abraham, acting under the firm name of N. Abraham Mercantile Company, was originally jointly liable for the indebtedness sued upon. N. Abraham Mercantile Company, the copartnership, transferred all the property of the copartnership to the corporation in consideration of an agreement on the part of the corporation to pay all the debts of the former partnership. This agreement would constitute the corporation a principal and the members of the copartnership and the copartnership sureties. Davis v. Heim-

bach, 75 Cal. 261, 17 P. 199; Cutting Packing Co. v. Packers' Exch., 86 Cal. 574, 25 P. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63; Imperial Refining Co. v. Kanotex Refinery Co. (C. C. A.), 29 F. (2d) 193, 199. If, therefore, the property seized by the sheriff was the property of the corporation, justice would require that this property be first subjected to the payment of the judgment for which the corporation was primarily liable before the property of N. Abraham, one of the partners for which appellant is surety, or of the other partners, is applied to the judgment, although the corporation is only a co-judgment debtor upon the face of the judgment."

And then, in reversing the judgment, the court laid down the law for the case thus:

"If it should appear from the evidence upon a new trial that there was sufficient property of the San Francisco Iron & Metal Company seized by the sheriff to satisfy the judgment, then the appellant surety (respondent on this second appeal), representing the rights of a joint debtor who was in law a surety on the obligation of that corporation, *would be entitled to enforce the entire judgment against the property of the corporation and therefore against the bond issued to release the property of the corporation.*"

"If, on the other hand, the property of the corporation thus released is insufficient to pay the judgment, the plaintiff (respondent on this second appeal) would be entitled to have the value thereof first applied to the judgment and as to any balance thereon to have one-half of the remainder thereof paid by L. Silberman and the enforcement of the

payment of that portion of the judgment against the undertaking of the appellee executed on his behalf."

The judgment was reversed and "the case remanded for further proceedings *not inconsistent herewith*".

On the retrial the trial court found (Record, pages 39-41):

"That thereafter, on the 14th day of February, 1929, said bond was amended as hereinafter mentioned and a stipulation was entered into as follows:

'In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 204,668

V. Berges,
Plaintiff,
vs.
N. Abraham, et al.,
Defendants.

Stipulation.

It is hereby stipulated and agreed between plaintiff, defendants San Francisco Iron & Metal Company, a corporation, H. Silberman, Sr., H. Silberman, Jr., and L. Silberman and the Century Indemnity Company, as follows:

1. That the bond of the Century Indemnity Company dated February 14, 1929, be and it is hereby corrected so as to change "Silverman" to "Silberman".

2. *That for the purposes of said bond, the plaintiff has before February 14, 1929, attached property, credits and effects of each of said four defendants of the then value of $6000.00 each.*

3. That said bond supersedes and takes the place of the Century Indemnity Company bond heretofore filed in the above matter and said former bond is hereby declared to be null and void and without effect.

Dated, February 14, 1929.

Robert E. Hatch,
Attorney for Plaintiff.
Louis E. Goodman,
Attorney for Defendants.
*The Century Indemnity Company,*
*By F. J. Crisp,*
*Attorney in Fact.'"*

This accorded with the allegations of the complaint (Record, pages 5-7) and the admissions in petitioner's answer. (Record, page 12.) So, by the very stipulation of this petitioner, "property, credits and effects" of San Francisco Iron & Metal Company had been attached to the extent of $6000.00; and, as the amount of respondent's claim (the judgment obtained by Berges in *Berges v. Abraham et al.*) was only $5643.65 principal plus a little interest and some costs (Record, page 105), the respondent became, as the Circuit Court of Appeals ruled in its opinion on the first appeal,

> "entitled to enforce the entire judgment against the property of the corporation and *therefore against the bond issued to release the property of the corporation*".

The District Court accordingly followed the directions of the Circuit Court of Appeals and gave judgment to respondent on that basis. (Record, page 49.) The judgment was for an even $6000.00 because the principal, interest and costs that had accumulated in *Berges v. Abraham et al.* to date of commencement of this action on September 24, 1931 exceeded $6000.00, the principal of petitioner's bond.

Also the District Court again admitted in evidence the judgment roll in *Berges v. Abraham.* (Record, page 58.) It also took additional evidence (Record, pages 119 to 130), namely the testimony of one Lon Harry Silberman. In its first opinion on this appeal the court reviewed Silberman's testimony and said (Record, page 163):

> "This evidence alone was sufficient to support the implied conclusion of the trial court that the San Francisco Iron & Metal Company had assumed the obligations of the copartners. It is clear that the judgment and findings in action No. 204668 are conclusive that the indebtedness sued upon was that of the partnership. It is therefore of no importance whether the findings in the superior court No. 204668 relative to the assumption of the entire debt by the San Francisco Iron & Metal Company is conclusive upon the parties to the action. We may assume as appellant contends that without additional evidence it is not."

Wherefore it is clear beyond argument that *under the law of the case as pronounced on the first appeal* the judgment was correct.

The substance of the decision on the *first* appeal is this: that Abraham and Silberman and San Francisco Iron & Metal Company were partners or joint adventurers and incurred a liability to the assignor of Berges; that thereafter San Francisco Iron & Metal Company assumed and agreed to pay the obligation; that Berges sued the three obligors and levied writs of attachment upon them separately and Abraham put up the bond of Fidelity & Casualty Company of New York in release of the attachment on him and the Century Indemnity Company put up a similar bond on behalf of Silberman and San Francisco Iron & Metal Company in release of attachments on them; that a judgment was later obtained by Berges against the three obligors and in the pleadings, findings and judgment it was made to appear that San Francisco Iron & Metal Company had assumed the obligation of the three defendants to Berges' assignor and had agreed to pay it; and that under these circumstances, when Fidelity & Casualty Company of New York paid Berges through Nelson on the basis of its bond and took an assignment of the judgment in Nelson's name, Nelson was entitled to recover the full amount of Berges' judgment from Century Indemnity Company.

That is the basis on which the case was retried and then decided in respondent's favor.

That also constitutes the "unassigned plain error" that petitioner claims to be "so clearly prejudicial as to result in injustice".

The injustice, if any, originated in the law of the case as established on the first appeal—seemingly approved by this court when it denied certiorari.

But we submit that justice has been done for the reasons stated in the opinion of the Circuit Court of Appeals on the first appeal.

(c)

The *second* decision on this appeal was rendered *June 7, 1937.* Petitioner promptly filed a petition for another rehearing and respondent replied. In our reply we called the court's attention to a case decided by the Supreme Court of California on *June 28, 1937,* entitled *Sanders v. Magill,* 94 Cal. Dec., page 34, where that court has fully confirmed our position. There Magill executed a note for $15,000.00 to a bank which he secured by a deed of trust upon real property. Later Magill transferred the property to one, Lyon, who, by Magill's deed to him, assumed and agreed to pay the encumbrance. At a later date Lyon endorsed and guaranteed the note at the bank and also pledged with the bank certain shares of stock which became the subject matter of the suit. The court said:

> "By this transaction, Lyon became the principal and the Magills the sureties of said note. (Braun v. Crew, 183 Cal. 728; Williams v. Naftziger, 103 Cal. 438, 440; Tompkins v. Powers, 106 Cal. App. 464, 466, and authorities cited in last cited case.) No act of Lyon or of any subsequent owner of said real property could affect or in any way alter this right of the Magills without their consent.
>
> A. H. Magill, being a surety on said note, even though he was the original principal thereon, upon paying said note under compulsion, or voluntarily acquiring the same by assignment was subrogated to all rights of the bank in and to said note.

(Beach v. Waite, 21 Cal. App. 304, 307; Vincent v. Garland, 86 Cal. App. Dec. 5.) By right of subrogation, or as the owner of said note by written assignment from the bank, Magill could proceed against all persons liable for the payment of the balance due on said note. The acquiring of an obligation by the surety does not extinguish the obligation, but the same remains in full force and effect in so far as the rights of the surety to recover from third parties liable upon the obligations are concerned. The bank then is in error in contending that the pleadings and evidence show no right of recovery exists in favor of Magill. Magill, not only had the right to pursue any endorser of said note who was personally liable for the balance due thereon, *but he was entitled to any existing securities given for the purpose of securing payment of said promissory note.* No rule of law is more firmly established than that a surety upon payment of the principal obligation succeeds to all the rights of the principal in and to said obligation. (Secs. 2848 and 2849, Civ. Code; 23 Cal. Jur., p. 1078.)"

Accordingly, the court affirmed the judgment in Magill's favor against the bank *for the recovery of the stock pledged by Lyon to secure the note.*

In our case Abraham is Magill and the San Francisco Iron & Metal Company is Lyon and the stock is the bond of the Century Indemnity Company and the bank is the Goodyear Redwood Lumber Company, Berges' assignor.

So the State Supreme Court has now established the law of the state in accordance with the decision of

the Circuit Court of Appeals in our case and petitioner has no ground left for complaint.

Doubtless the decision of the State Supreme Court convinced the Circuit Court of Appeals all the more firmly that its refusal to notice petitioner's claim of unassigned plain error did not do petitioner any injustice.

We respectfully submit, therefore, that the petition should be denied.

Dated, San Francisco, California,
September 15, 1937.

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D. HADSELL,
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